

**BEFORE THE DIRECTOR OF THE  
DEPARTMENT OF PESTICIDE REGULATION  
STATE OF CALIFORNIA**

In the Matter of the Decision of  
the Agricultural Commissioner of  
the County of Calaveras  
(County File No. 001-ACP-CAL-04/05)

Administrative Docket No. 121

**DECISION**

San Joaquin Sulphur Company  
720 North Sacramento, P.O. Box 700  
Lodi, CA 95241

Appellant /

**Procedural Background**

Under Food and Agricultural Code (FAC) section 12999.5 and section 6130 of Title 3, California Code of Regulations (3 CCR), county agricultural commissioners (CACs) may levy a civil penalty up to \$1,000 for certain violations of California's pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing, the Calaveras CAC found that the appellant, San Joaquin Sulphur Company (SJSC), committed three violations of the State's pesticide laws and regulations, pertaining to 3 CCR sections 6568(a) and (c). The commissioner imposed a total penalty of \$600 for the violations.

SJSC appealed from the commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation. The Director has jurisdiction in the appeal under FAC section 12999.5.

**Standard of Review**

The Director decides matters of law using her independent judgment. Matters of law include the meaning and requirements of laws and regulations. For other matters, the Director decides the appeal on the record before the Hearing Officer. In reviewing the commissioner's decision, the Director looks to see if there was substantial evidence, contradicted or uncontradicted, before the Hearing Officer to support the Hearing Officer's findings and the commissioner's decision. The Director notes that witnesses sometimes present contradictory testimony and information; however, issues of witness credibility are the province of the Hearing Officer.

The substantial evidence test requires only enough relevant information and inferences from that information to support a conclusion, even though other conclusions might also have San Joaquin Sulphur Company

been reached. In making the substantial evidence determination, the Director draws all reasonable inferences from the information in the record to support the findings, and reviews the record in the light most favorable to the commissioner's decision. If the Director finds substantial evidence in the record to support the commissioner's decision, the Director affirms the decision.

### **Factual Background**

The Calaveras CAC issued a Violation Notice on August 31, 2004, to SJSC for three violations of California's pesticide laws. Violation one found that SJSC sold Gramoxone to Raven Oaks Vineyard on April 5, 2004, in violation of 3 CCR section 6568(a). Gramoxone is a restricted material and at the time of sale, Raven Oaks Vineyard did not possess a restricted materials permit. SJSC did not deliver the Gramoxone to Raven Oak, as no permit was produced at the time of delivery. Violation two found that SJSC sold sulphur, Rally, and Roundup Ultramax to Raven Oaks Vineyard on April 5, 2004, in violation of 3 CCR section 6568(c). Raven Oaks did not have a valid operator identification number at the time of sale. Raven Oaks did have a valid operator identification number by April 19, 2004, the date of delivery. Violation three found that SJSC sold Kocide to Star Canyon Farms in violation of 3 CCR section 6568(c). Star Canyon did not have a valid operator identification number at the time of sale and delivery on February 26, 2004.

### **California Code of Regulations (CCR) Section 6568**

CCR section 6568(a) provides: "[E]ach licensed pest control dealer that sells a restricted material which requires a permit for its use or possession shall, before sale or delivery, obtain a copy of the permit."

Section 6568(c) provides: "[P]rior to the sale or delivery of pesticides listed in section 6622 to the operator of the property (or the operator's authorized representative) the dealer shall obtain from the purchaser a copy of the restricted material permit showing all operator identification numbers, if the purchaser has such a permit; or a copy of the form issued to an operator of the property pursuant to section 6622."

### **Appellant's Allegations**

As to violation one, Appellant contends that it did not "sell" Gramoxone to Raven Oaks because "sell" includes the act of taking possession of the material. Appellant contends that Raven Oaks ordered and paid for Gramoxone (and the pesticides involved in violation two) on April 5, 2004, but was informed that the material could not be taken from the premises without Joaquin Sulphur Company

the proper permits. When Raven Oaks appeared at SJSC to pick up the ordered materials (April 19, 2004), the permit presented to SJSC did not include a permit for a restricted material. SJSC did not release Gramoxone to Raven Oaks and refunded Raven Oaks' payment.

As to violation two, Appellant contends that it did not sell sulphur, Rally, and Roundup Ultramax to Raven Oaks until such time as Raven Oaks presented a proper operator identification number. Although the materials had been ordered and paid for on April 5, 2004, Raven Oaks did not take possession of the materials until April 19, 2004, after presenting a valid operator identification number. Appellant contends that a sale is not consummated until the transfer or exchange of goods occurs.

As to violation three, Appellant contends that when Star Canyon purchased and took possession of ten pounds of Kocide (February 26, 2004), SJSC had on file an operator identification number and learned only afterwards that Star Canyon's operator identification number had expired. Appellant contends that Star Canyon obtained a new operator identification number on March 13, 2004, and provided that number to SJSC. Appellant contends that Star Canyon has not used the material and intended to return it. At hearing, Appellant also contended that Star Canyon is a small farm under ten acres and since ten pounds of Kocide would treat very little acreage, it was assumed that the use was not agricultural so that Star Canyon was exempt from the requirements of an operator identification number.

The CAC levied a \$400 fine for violation one and fines of \$100 each for violations two and three. The appellant in this appeal has not contested the amount of the fines.

### **The Hearing Officer's Decision**

#### **Violation One**

Regarding violation one, the Hearing Officer found, and the record supports, that it was undisputed that the purchaser (Raven Oaks) ordered and paid for Gramoxone, a restricted material. SJSC did not have on file the proper restricted materials permit at the time the pesticide was paid for. The only issue remaining is whether a sale or delivery of a pesticide occurred prior to obtaining the proper permit in violation of law. The Hearing Officer found that, since money changed hands, a sale had occurred. The Hearing Officer determined that under the regulations, if a sales transaction has occurred before the dealer is in possession of a valid permit and/or operator identification number, the regulation has been violated, regardless of whether (or when) delivery has occurred.

CCR sections 6568(a) and 6568(c) require that the pesticide dealer have the proper documents *prior to sale or delivery*. The plain language of the regulations treats a sale and a

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delivery as separate and distinct acts. The word “sale” is not defined in either the general definition sections of the FAC or in the law and regulations dealing with pesticides. The parties assert conflicting and reasonable definitions of the word “sale.” However, determining the proper definition of “sale” is not required to reach a decision in this case. Rather, by looking to the language of FAC section 14006.5, the statute that 3 CCR section 6568 is meant to implement, and the plain language of the regulation in light of accepted rules of statutory construction, the proper application of the regulation is clear.

FAC section 14006.5 makes it unlawful for any person to use or possess any pesticide designated as a restricted material except under a written permit of the commissioner. FAC section 14010 makes it unlawful for any person to sell or deliver any restricted material to any person who is required to have a permit to possess or use the restricted material, unless the permittee (or agent) provides to the seller or the person delivering the restricted material, a copy of the permit authorizing possession or use “*on the date the restricted material is delivered*” (emphasis added). The Legislature clearly intended to prohibit the possession or use of a restricted material without a permit by requiring the proof of permit before delivery. Therefore, because the regulation must be read in order to effectuate the statutory scheme, 3 CCR section 6568(a) must be read that a pesticide seller’s obligations under the law are met if he or she obtains a copy of the restricted material permit prior to the sale of the material, *or* if he or she obtains a copy of the restricted materials permit prior to its delivery. Either way, the restricted material will not be possessed or used without proof of permit.<sup>1</sup>

This reading is consistent with a well-known rule of statutory construction that addresses the use of the word “and” and the word “or.” The word “and” requires that each condition listed must be satisfied to avoid violation. However, if a statute or regulation uses the word “or,” then meeting any condition listed satisfies the requirement of the law.

Although SJSC ordered and accepted payment from Raven Oaks for Gramoxone on April 5, 2004, SJSC did not allow Raven Oaks to take possession of the restricted material. When Raven Oaks returned on April 19, 2004, to pick up its order of pesticides, SJSC did not allow Raven Oaks to take possession of the Gramoxone because it did not have a restricted materials permit. Moreover, SJSC rescinded the sale and refunded the purchase price. Therefore, SJSC did not violate the requirements of the regulation, as it did not deliver the product to Raven Oaks.

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<sup>1</sup> It should be noted that, in compliance with law, SJSC reported all sales of restricted materials to the commissioner. The commissioner’s audit revealed that, at the time of “sale,” Raven Oaks did not possess the required permit. If SJSC’s records had accurately reflected what actually occurred or if SJSC had required the permit before payment, it would have been clear that no delivery in violation of FAC section 14010 had occurred.

### Violation Two

As to violation two, the factual evidence is undisputed that on April 5, 2004, SJSC accepted an order and payment from Raven Oaks for sulphur, Rally, and Roundup Ultramax, without first having a valid operator identification number on file. However, on April 19, 2004, the day Raven Oaks picked up the pesticides, Raven Oaks presented SJSC with a valid operator identification number. Therefore, based on the same reasoning as above, at the time of delivery, SJSC's obligation under 3 CCR section 6568(c) to obtain the proper operator identification number was satisfied.

### Violation Three

In the case of violation three, it is undisputed that Star Canyon ordered, paid for, and took possession of pesticides on February 26, 2004, without having a valid operator identification number. The record shows that Star Canyon had obtained an operator identification number on March 13, 2002, which had expired on December 31, 2002. The record also demonstrated that Star Canyon did not obtain a new operator identification number until August 26, 2004. No evidence was presented at the hearing that SJSC had any specific information regarding Star Canyon's use of Kocide at the time of sale and delivery that would justify an exemption from 3 CCR section 6568(c). Therefore, substantial evidence exists, largely uncontradicted, before the Hearing Officer to support the Hearing Officer's findings and the commissioner's decision.

### **Conclusion**

The record shows that as to violations one and two, the evidences does not support a violation under the law. As to violation three, the commissioner's decision is supported by substantial evidence.

### **Disposition**

The commissioner's decision is overturned and set aside as to violations one and two. The commissioner's decision is affirmed as to violation three. The commissioner shall notify the appellant how and when to pay the \$100 fine.

**Judicial Review**

Under FAC section 12999.5, the appellant may seek court review of the Director's decision within 30 days of the date of the decision. The appellant must file a petition for writ of mandate with the court and bring the action under Code of Civil Procedure section 1094.5.

**STATE OF CALIFORNIA**  
**DEPARTMENT OF PESTICIDE REGULATION**

By: \_\_\_\_\_ Dated: \_\_\_\_\_  
Mary-Ann Warmerdam  
Director